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IN THE

Supreme Court of the United States

October Term, 1968
No. 203

WILLIAM E. THORESEN, III,
Petitioner,

vs.

STATE OF MAINE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Maine.

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WILLIAM E. THORESEN, III,

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STATE OF MAINE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Maine.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Maine, entered in the above-entitled case on March 18, 1968.

Jurisdiction.

This Court has jurisdiction under Title 28, Sec. 1257, U.S.C. The matter was instituted in 1967 as an original proceeding in the Superior Court of the State of Maine by way of a petition for post-conviction relief. Therein Petitioner alleged federal and state constitutional violations in his 1959 Maine conviction of a crime punishable by imprisonment for more than one year and that said conviction was then the basis for a pending federal indictment. The Court dismissed the petition on its face, holding that post-conviction relief was not available because Petitioner had served his sentence. Petitioner's appeal to the Maine Supreme Court was denied for the same reason.

Question Presented.

Whether the State of Maine is required by the Federal Constitution, under the circumstances set forth herein, to provide a post-conviction process for hearing and determining claims that a felony-type conviction violated the Federal and Maine Constitutions, even though the sentence therefor had been completely served.

Statement.

Petitioner, in September of 1959, when 21 years of age, was convicted, upon a plea of guilty, in the State of Maine, of larceny of six pictures in the aggregate value of $150.00. In September of 1961, the sentence therefor, consisting of probation, was completely served. In October, 1967, Petitioner filed a petition in the Superior Court in Maine seeking post-conviction relief to vacate said plea and conviction. He claimed therein that said conviction was based on numerous violations of the Constitutions of Maine and the United States. Among such claims were that because of ineffective counsel and interference by the State with the attorney-client relationship he had been deprived of the effective assistance of counsel; that the plea was not voluntary; that the State had made misrepresentations including the value of goods taken by Petitioner; further, that in June of 1967, he was indicted under Title 15, U.S.C., Sec. 902(e), which proscribes shipping firearms in interstate commerce by persons who have been convicted of a crime punishable by imprisonment for more than one year; that the sole basis for said indictment was the aforementioned Maine conviction; and that he had only recently learned the true facts including the fact that the true value of the pictures taken

was approximately $26.00. The theft of property valued at less than $100.00 is punishable in Maine by imprisonment for not more than six months, whereas theft in excess of $100.00 is punishable by imprisonment for more than one year. Maine Revised Statutes Annotated, Sec. 2101.

In his Memorandum of Points and Authorities submitted to the Superior Court, Petitioner referred to *State v. Blackford Circuit Court,* 229 Ind. 3, 95 N.E. 2d 556 (1950) wherein the Indiana Supreme Court held that the five-year statute of limitations on its *coram nobis* statute violated the due process clause of the United States Constitution. A copy of said Memorandum of Points and Authorities is attached hereto as Appendix A.

The Superior Court, on December 4, 1967 per an Associate Justice of the Maine Supreme Court, sitting in the Superior Court, dismissed the petition on its face, holding that Petitioner was not entitled to post-conviction relief because he had completed his sentence, citing *Longway v. State,* 161 Me. 430, 231 A. 2d 519 (1965) and 14 Maine Revised Statutes Annotated, Sec. 5502. A copy of said decree is attached hereto as Appendix B. The latter statutory provision is annexed hereto as Appendix C. The intention of the Legislature, said the Court, was that said statute "should become the sole vehicle for post-conviction relief in criminal matters."

The Maine Supreme Court, on March 18, 1968, denied Petitioner's appeal in *Thoresen v. State,* stating that the Maine statute and the *Longway* case, *supra,* require current service of sentence as a prerequisite to post-conviction relief and that the "ab-

sence of any form of continuing restraint in the instant case is fatal to the Petitioner's claim." The opinion of the Supreme Court of Maine is reported at 239 A. 2d 654 (1968). It is attached as Appendix D hereto.

Petitioner's subsequent application for a Writ of Habeas Corpus in the Maine Federal District Court was dismissed because of the absence of restraint. A copy of the order of dismissal is attached hereto as Appendix E. The United States Court of Appeals, First Circuit, denied a certificate of probable cause on May 13, 1968, with an addendum on May 24, 1968, Misc. No. 263.

Petitioner's subsequent application for a Writ of Habeas Corpus in the Federal District Court, Northern District of California was denied for lack of jurisdiction. The Court of Appeals, Ninth Circuit denied, on May 28, 1968, an application for probable cause on appeal. Case No. 22919.

Trial is set for June 24, 1968, in Fresno, California, on a superseded federal indictment based on the aforementioned code section. The trial court has denied petitioner's motion for a pre-trial determination of his claim that the Maine conviction violated the Federal Constitution.

In addition, Petitioner, in March, 1968, was indicted by a Federal Grand Jury in the Southern District of New York on similar charges. Said indictment is currently pending.

Reason for Granting the Writ.

The decision of the Maine Supreme Court raises an important question with respect to the duty of a state to provide to one who has fully served his sentence, a post conviction process for the determination of a claim that his felony-type conviction was based on violations of the Federal Constitution. Certiorari should be granted so that this question may be determined.

A. States Are Required to Provide a Post-Conviction Process for Determining Federal Constitutional Violations.

In *Case v. Nebraska,* 381 U.S. 336, 14 L. Ed. 2d 422, 85 S. Ct. 1486 (1965), this Court had granted certiorari

> "to decide whether the Fourteenth Amendment requires that the states afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of Federal Constitutional guarantees." "Happily, Nebraska in the interim has adopted just such a procedure thus obviating the necessity of our passing upon the question".

In *Foster v. Illinois,* 332 U.S. 134, 139 (1947), this Court said:

> "They (claims) must be raised by whatever procedure Illinois may provide, or, in default of relief by appropriate Illinois proceedings, *by a new claim of denial of due process for want of such relief.* See Mooney v. Holohan, 294 U.S. 103." (Emphasis supplied)

In *Young v. Ragen,* 337 U.S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073, this Court articulated the principle that states must afford prisoners some "clearly defined method by which they must raise claims of denial of Federal rights." In *N.Y. ex. rel. Whitman v. Wilson,* 318 U.S. 688, 87 L. Ed. 1083, 63 S. Ct. 840 (1943) this Court noted that the post-conviction case of *Lyons v. Goldstein* (290 N.Y. 19) "rests in part on the requirement of the due process clause that a prisoner be granted a hearing on the merits of such contention. . . ." And see: *Frank v. Mangum,* 237 U.S. 309, 335, 59 L. Ed. 969, 35 S. Ct. 582; *Moore v. Dempsey,* 261 U.S. 86, 91, 67 L. Ed. 543, 43 S. Ct. 265; *Mooney v. Holohan,* 294 U.S. 103, 113, 79 L. Ed. 791, 55 S. Ct. 340; *Taylor v. Alabama,* 335 U.S. 252, 272, 92 L. Ed. 1935, 68 S. Ct. 1415.

B. Completion of Sentence Is No Reason to Insulate an Unconstitutional Conviction From Challenge.

Although the aforementioned cases involved prisoners in custody, it is submitted that it makes no difference, where constitutional rights are involved, whether the sentence has been served or not.

In *Fiswick v. United States,* 329 U.S. 211, 91 L. Ed. 196, 67 S. Ct. 224 (1946), involving the Federal Alien Registration Act, this Court held that service of sentence did not render the cause moot since the matter involved an alien who became subject to deportation because of the conviction.

In *United States v. Morgan,* 346 U.S. 502 (1954), this Court held that *coram nobis* was available in the Federal Courts although the federal sentence had been served before the commencement of proceedings to set

aside the conviction because the "results of the conviction may persist, subsequent convictions may carry heavier penalties, civil rights may be affected."

In April of this year this Court, in *Ginsberg v. New York*, ... U.S. ...., 20 L. Ed. 2d 195, n. 2 88 S. Ct. .... (1968) held that a state trial court's suspension of sentence, although its action had become irrevocable by lapse of the time prescribed by statute, did not render moot defendant's appeal from his state conviction (to the U.S. Supreme Court) where he has shown that under state law further penalties or disabilities can be imposed on him as a result of the judgment of conviction, such as the possibility of ineligibility for licensing under state and municipal laws regulating various lawful occupations.

In *Carafas v. La Vallee*, ... U.S. ...., 36 LW 4409, involving Federal habeas corpus for a state prisoner, this Court declared last month (May 20, 1968) that (36 LW 4409, 4410):

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' *Fiswick v. United States*, 329 U.S. 211, 222 (1946). On account of these 'collateral circumstances' the case is not moot."

Thus, this Court has held, albeit in connection with Federal appeals and habeas corpus, that completion of sentence does not render the conviction moot, *i.e.*, a person convicted of a felony has sufficient interest in vindicating his constitutional rights although his sentence has been served. If therefore, as indicated hereinabove, a state court is under a constitutional mandate to provide a post-conviction process for a person then serving his sentence, it must likewise do so for a convicted felon who has completed his sentence. *This is a logical consequence of the holdings of this Court that the completion of the sentence does not remove the disabilities flowing from the conviction.*

C. The Issue of Mootness Is a Federal Question.

Furthermore, the issue of mootness of a constitutionally invalid conviction is itself a Federal question. Therefore, a holding of mootness by the state court may not preclude this Court from taking a contrary view. In *Liner v. Jasco, Inc.*, 375 U.S. 301 (1964), a state trial court, rejecting a defense of federal preemption, enjoined peaceful picketing at a construction site. The State Supreme Court affirmed on the dual grounds that the preemption defense had been properly rejected and that the cause had become moot by reason of the completion of construction pending appeal. This Court held that it was not bound by the state court's holding that the case was rendered moot, and that "the question of mootness is itself a question of federal law, upon which we must pronounce final judgment."

By virtue of the supremacy clause of the United States Constitution, state courts must, in the absence of a valid excuse, entertain and adjudicate federal claims. *Robb v. Connolly,* 111 U.S. 624, 637, 28 L. Ed. 542, 4 S. Ct. 544; *General Oil Co. v. Crain,* 209 U.S., 211, 228, 52 L. Ed. 754, 28 S. Ct. 475. Maine has no valid reason to refuse petitioner a hearing on his federal claims. The Maine statute, to the extent that it bars vindication of federal constitutional rights, is void as being repugnant to the federal constitution.

Conclusion.

The federal interest in the vindication of Fourteenth Amendment rights in state proceedings is, in many situations, adequately protected by the availability of federal habeas corpus. This is not so in the instant matter, as set forth hereinabove.* If Maine, therefore, may bar a remedy under the circumstances, no vehicle is available to petitioner to determine his constitutional claims.

The issue is gaining in importance because of the new requirements resulting from expanding concepts of federal procedural due process. Thus even in a *Gideon*-type** situation all avenues of relief would be cut off where a state conviction was involved. The matter is of great importance for all states which condition post-conviction relief on current service of sen-

*Note statutory restrictions on availability of federal habeas corpus in 28 U.S.C. Sec. 2241.

***Gideon v. Wainright,* 372 U.S. 335 (1963); see U.S. *ex rel.* *Durocher v. La Vallee* on retroactivity.

tence. The speedy payment of a fine or termination of sentence would foreclose review in states with Maine-type rules.

It is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

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MELVIN W. MILLER,
Attorneys for Petitioner.

June 1968.

APPENDIX A.

Memorandum of Points and Authorities in Support of Petition Herein.

William E. Thoresen, III, Petitioner, vs. State of Maine, Respondent.

I.

INTRODUCTION

This proceeding is instituted to vacate the plea of guilty and larceny conviction herein of September 21, 1959.

Said proceeding is brought pursuant to Title 14, Section 5502, et seq., M.R.S.A.; writ of *coram nobis*; writ in the nature of *coram nobis*; and the general equity powers of this court.

Petitioner was arrested in Bar Harbor, Maine, on September 8, 1959 and charged with larceny.

On September 21, 1959 in Ellsworth, Maine, Petitioner waived prosecution by Indictment, a jury trial, and was convicted, on a plea of guilty, of the crime charged in the Information, to-wit, larceny on September 7, 1959 of six pictures in the aggregate value of ONE HUNDRED FIFTY ($150.00) DOLLARS, at Bar Harbor, Maine, the property of the Canadian National Railways.

Judge James Archibald, presiding, sentenced Petitioner to the Men's Reformatory at South Windham, County of Cumberland; ordered the confinement suspended, and placed Petitioner in custody of the State Probation and Parole Board for a term of two years. Petitioner complied with the terms and conditions of his probation, which probation was formally terminated at the September 1961 term of the Hancock Superior Court, per Justice T. E. DeLahanty.

II.

FACTS AND ARGUMENT.

Petitioner urges upon this Court as follows:

That the petition and affidavits in support thereof indicate, among other things, that Petitioner pled guilty herein on the mistaken assumption that he was pleading to a misdemeanor-type, minor offense. That he was not and is not guilty of the crime of larceny of goods valued in excess of $100; that there was no taking of goods of such value; that the value of the pictures taken was approximately $26.00; that he did not know on September 21, 1959 that such was the value of the pictures taken; that lack of such knowledge was not due to any negligence on his part. Further, that Petitioner's plea of guilty herein was induced by misrepresentation on the part of the County Attorney who mislead Petitioner and the Court into believing that the true value of the pictures taken was $150.00; that said plea was further induced by and based on a misrepresentation by the County Attorney to Petitioner that he was to plead to and be convicted of a misdemeanor-type, minor offense; that the County Attorney urged other persons, including the present wife and the father of Petitioner, to help the County Attorney gain the confidence of Petitioner.

As part of the said misrepresentation the County Attorney requested Petitioner's present wife, who was also incarcerated with Petitioner, to inform Petitioner that if Petitioner cooperated he would receive the same fate as Petitioner's current wife. Petitioner's current wife was discharged without any conviction.

Further, that the County Attorney visited Petitioner and his father in their hotel rooms on many occasions,

and Petitioner in his jail cell, without the presence of Petitioner's counsel although the County Attorney knew that Petitioner had counsel. Further, that the County Attorney intentionally undermined Petitioner's faith in Petitioner's attorney, thus interfering with Petitioner's relationship with his counsel and resulting in Petitioner placing his faith in said County Attorney.

Further, Petitioner labored under the mistake that the value of the pictures taken was $150.00; Petitioner was further mistaken as to the nature and consequence of his plea, believing that he was pleading to a misdemeanor. Further, that Petitioner would not have so pled had he known the true facts.

Petitioner's counsel was so ineffective and incompetent as to amount to a deprivation of counsel. Petitioner's counsel at no time attempted to nor did he secure an appraisal of the pictures taken to determine their value or otherwise investigate the value of said pictures, nor did he interview any witnesses, including any complaining witnesses, to determine the value thereof. Petitioner's counsel did not fully nd properly advise Petitioner of his rights, the facts that the State must prove, and the implications, consequences and nature of the charge, plea and conviction. Said counsel permitted Petitioner to plead guilty when investigation would have revealed the pictures were worth approximately $26.00. Further, said counsel did not advise Petitioner to seek a new trial or to appeal.

There is an error of fact not of record, which was not known to the accused and to the court, and which by the use of reasonable diligence could not have been known to the accused at the time of the trial and which, if known, would have prevented the conviction.

Said error consists of the fact that the value of the pictures taken was approximately $26.00, whereas the Information charged and the court assumed, that the value was $150.00.

Further, the crime Petitioner was convicted of was not committed. The value of the pictures did not exceed approximately $26.00, therefore, theft of property valued at $150.00 did not occur. Had this fact been known to the court the conviction herein could not and would not have taken place.

The conviction and sentence were in violation of the constitution of the United States and of Maine because of:

1. Counsel was so ineffective as to amount to a deprivation of counsel in violation of the due process clauses of said constitutions;

2. The misrepresentations on the part of the County Attorney in procuring the plea and conviction, as aforementioned;

3. The interference by the County Attorney with Petitioner's relationship with his counsel, which resulted from the County Attorney's remarks and conferences with Petitioner and others without the presence of Petitioner's counsel;

4. Petitioner was convicted of a crime which was not committed.

A plea of guilty may be set aside and a conviction thereon vacated, via the remedy of coram nobis or the equivalent statutory remedy where the plea of guilty was procured unjustly or as the result of ignorance or excusable mistake of fact or by fraud, misrepresentation, trickery, deceit or duress.

That Petitioner only recently learned that he had been, on said September 21, 1959, convicted of a crime punishable by imprisonment for more than one year. Petitioner has also only recently discovered that the value of the pictures taken was approximately $26.00. The theft of property valued at less than $100.00 is punishable by imprisonment for not more than six months.

That Petitioner, as a result of the aforementioned injustice, currently suffers the status of a convicted felon. As a result thereof Petitioner stands indicted under Title 15 U.S.C. Sec. 902(e) which, but for the aforementioned conviction, could not have occurred. Because of this and other disabilities, Petitioner stands in need of post-conviction redress. A pardon would not suffice.

A. PROCEDURE

Post-conviction remedies are available to Petitioner herein, who has present need thereof.

Dwyer v. State of Maine, 151 Me. 382, 120 A.2d 276 (1956) involved a post-conviction coram nobis petition to strike a guilty plea entered some 18 years previously, said plea having allegedly resulted from duress and threats. The Supreme Court of Maine, holding that coram nobis was available in this state, said (151 Me. at 389):

> "Its object is . . . to correct the record in matters of fact existing at the time of pronouncement of judgment in respect of which the court was unadvised, whereas, had it been advised, the judgment would not have been pronounced."

The court declared that coram nobis had always been part of the law of Maine (392 Me. at 392-393):

> "The writ of error coram nobis was originally, and now is a part of the procedural law of Maine. Article X, Section 3 of the Constitution of Maine states: 'All laws now in force in this state, and not repugnant to this constitution, shall remain, and be in force, until altered or repealed by the legislature, or shall expire by their own limitation.'
>
> "In 1820, when Maine because a state, this article in the Constitution of Maine effectively incorporated all 'laws' then in force . . . A writ of error *coram nobis* was then recognized as a remedy. . . .
>
> "Article 1, Section 6 of the Maine Constitution, however, guarantees a person against deprivation of life, liberty, property or privileges, except by 'judgment of his peers or the law of the land.' The later phrase, it has often been recognized, incorporates the process and proceedings of the common law. *State v. Learned*, 47 Me. 426, 432; *Sacca v. Wentworth*, 37 Me. 165, 171.
>
> "The writ of error *coram nobis* is found in many early Maine cases which recognize this writ. . . .
>
> "There is no statute that prohibits, limits or prevents the use of the writ of error *coram nobis*. We find no case in Maine, and no case has been called to our attention, where the writ of error *coram nobis* has been petitioned for in Maine and has been denied on the ground that its use is not authorized by law. In fact, we know that writs of error *coram nobis* have been occasionally issued

> in the Superior Court in recent years, because of decisions in the U. S. Supreme Court . . . An examination of the recent cases in Maine, involving writs of error, show that they were writs of error brought under the statute, and the common law writ of error *coram nobis* was not asked for."

Thus, coram nobis has always been available as a post-conviction remedy in the State of Maine.

The authorities indicate, as set forth hereinafter, that there have been no time, custody, confinement or probation prerequisites for the invocation of the remedy of *coram nobis*.

Longway v. State, 161 Me. 430, 213 A.2d 519 (1965), which referred to 14 M.R.S.A., Section 5502, and which has been cited for the proposition that a prisoner must be in custody in order to be eligible for habeas corpus, does not preclude the petition herein. *Longway* is distinguishable, and otherwise not controlling herein, as set forth hereinafter.

Firstly, the decision in *Longway* was based on alternative grounds. The court determined that irrespective of any procedural difficulties, the petitioner therein was not entitled to relief. Said the court (161 Me. at 433):

> "We are satisfied that were this case before us on its merits the result would be the same. The petitioner was represented by competent counsel in both trials and the issues clearly presented and adjudicated."

Secondly, the writ discussed and applied in *Longway* was that of habeas corpus (See Petitioner's Brief

(*Longway*), Page 2). The declaration of the court that habeas corpus is not available when a sentence is served, has no application, therefore, to coram nobis. As indicated hereinafter, all the cases cited in *Longway* relate to the remedy of habeas corpus, or Section 2255 of the United States Code, which is the equivalent thereof. Habeas corpus traditionally was available only to a prisioner detained in custody. Thus the cases cited in *Longway* are distinguishable, as follows: *McNally v. Hill,* a 1934 *habeas corpus* case, quotes the Federal Statute as expressly requiring custody and refers to the history of habeas corpus as the remedy to determine the legality of the restraint. Likewise, ex parte *Baez* (an 1899 *habeas corpus* case), and *Weber v. Squier,* which was a mere per curiam decision denying certiorari (see decision in the court below, 124 F.2d 618 (1941)). Similarly, *Tornello v. Hudspeth* (per curiam *habeas corpus* decision; see decision below, 128 F.2d 172 (1942)), and *Zimmerman v. Walker* (1943) (per curiam decision, *habeas corpus;* see decision below 132 F.2d 172 (1942)). Likewise *U. S. v. Brest,* a 1959 case, involved habeas corpus and USC Section 2255; *Heflin v. U.S.*, was likewise a habeas corpus case, although it would allow relief under Federal Rule 35. *Perry v. U.S.* involved Section 2255, and *Buckner v. Hudspeth* is a 1939 habeas corpus case.

In *Sanders v. U.S.*, 373 U.S. 1, 14, the court said:

> "As we said just last Term, 'it conclusively appears from the historic context in which Sec. 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had pre-

viously been available by habeas corpus in the court of the district where the prisoner was confined.' Hill v. United States, 368 U.S. 424, 427."

A Note, 694 Yale L.J. 786, 789 states:

"Thus, the modern habeas writ and the motion under Section 2255 are substantive equivalents.

"In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail."

Jones v. Cunningham, 371 U.S. 236, 238 (1962):

"If there was any single feature that characterized the writ of habeas corpus in both its early statutory and common-law forms, it was the requirement that adult petitioners be subject to an immediate and confining restraint on their ability."

Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich L. Rev. 451, 469 (1966).

In *United States v. Morgan,* 346 U.S. 502, 98 L. ed. 248, 74 S. Ct. 247 (1954), the Supreme Court explicitly declared that, as to the requirement of present custody or detention, there is a distinction between the remedy of *habeas corpus* and that of *coram nobis* and that the custody or detention requirement applies only to *habeas corpus* whereas in coram nobis there has been and is no requirement of custody or detention.

In *Morgan,* petitioner, after having served his sentence for a federal offense, was convicted, approximately 11 years later, by a New York court on a state charge and sentenced to a longer term as a second offender because of the prior federal conviction. Petitioner then

sought a writ of error coram nobis to vacate his federal conviction, which had been based on a guilty plea. The court held that the federal courts have the power, pursuant to a writ in the nature of *coram nobis,* to vacate a judgment of conviction after the full term of service. The court said (98 L.ed., 254-257):

> "The writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment, and was used in both civil and criminal cases."
>
> "The contention is made that Section 2255 of Title 28, USC, providing that a petitioner 'in custody' may at any time move the court which imposed the sentence to vacate it, if 'in violation of the constitution or laws of the United States, should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. We see no compelling reason to reach that conclusion. In United States v. Hayman, 342 U.S. 205, 219, 96 L. ed. 232, 241, 72 S.Ct. 263, we stated the purpose of Section 2255 was 'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction. We added: 'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.' We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of Section 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion."

> *"Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.* As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid." (Emphasis added.)

Eli Frank, in his *Coram Nobis (Common Law—Federal—Statutory),* (1953), (1960 Cumulative Supplement, 123-125) states, in discussing *Morgan:*

> "Thus any indecision in the federal courts as to the availability of the writ (Coram nobis), either on the theory that it had been abolished by modern motion practice or superseded by 28 U.S.C. Section 2255, has been dissolved and the writ may be entertained 'to achieve justice.'
>
> "The proper remedy to pursue in proceedings to vacate a criminal conviction is now evident. Where a defendant is not in custody by virtue of the conviction being assailed, coram nobis is applicable; where he is in custody thereunder, the proceedings should be denominated as one under 28 U.S.C. Section 2255."

Longway contains no reference to *Morgan.* Nor was *Morgan* cited in either of the Briefs submitted to the Court. Petitioner in *Longway* proceeded under habeas corpus because at the time of the petition he was in custody (see Brief for petitioner, Maine Supreme Judicial Court, p. 2). He was discharged during the habeas corpus proceedings but before October 19, 1965, the date of the Court's opinion. Therein lies the explanation why counsel for Petitioner in *Longway*

proceeded via habeas corpus .(which traditionally required detention); his failure to discuss, in his Brief, the issue of whether or not detention was required for redress; and his failure to refer to *Morgan*. The brief of the Attorney General likewise contains merely a cursory discussion of the detention requirement.

In contrast to habeas corpus, coram nobis has been traditionally available although the petitioner had been released from custody.

See, for example:

Lopez v. Kellegrew, 202 Ind. 397, 174 N.E. 808, 810 (1931) (Held, although the fine was paid and 30-day sentence served, it is "more consonant with justice" to hold that the issue is not moot; "the right of reputation was early recognized in Anglo-American law, and the machinery of legal redress is at the disposal of any person to vindicate his name.")

Matter of Hogan v. Court of General Sessions, 296 N.Y. 1, 68 N.E. 2d 849 (1946) (petition more than 25 years after conviction).

State v. Stodulski, 298 S.W. 2d 420 (Mo., 1957) (following *Morgan,* held coram nobis available although sentence had been served. Relief applied for approximately 15 years after conviction.)

State v. Harrison, 299 S.W.2d 479 (Mo., 1957) (following *Morgan;* petition apparently approximately 25 years after conviction.)

State v. Huffman, 207 Or. 372, 297 P.2d 831 (1956), wherein the court posed the question (297 P.2d at 840-841):

> "It remains to be determined whether in this state there is a residuum of common-law power to grant

relief from a conviction . . . by means of a motion in the nature of coram nobis when the moving defendant is not in custody and when therefore habeas corpus is not available."

The court held that the court had the power, despite the fact that, as the decision indicated (297 P.2d at 846):

"The defendant has served his time and is at large, there is no showing that any further governmental action against him is pending or contemplated."

"Certain of the cases cited supra tend to indicate that jurisdiction exists even though defendant is not in custody. Jurisdiction appears to exist . . . regardless of any effect which the relief prayed for would have upon any substantial right of the defendant. . . . (Ibid. at 849)."

The court continues (297 P.2d 849):

"Again, jurisdiction may be exercised in another group of cases in which defendant is no longer serving the sentence imposed, but his substantial rights will be affected by the granting of the relief sought. This group includes cases in which relief if granted would favorably affect his status as a recidivist under statutes imposing heavier sentences because of repeated convictions . . . filed in a case in which there was no other suitable remedy will receive consideration."

It is noteworthy, moreover, that even in *habeas corpus* cases the courts have been taking an increasingly liberal view re the requirement of custody and detention.

In *Jones v. Cunningham,* 371 U.S. 236, 9 L. ed. 2d 285 (1963) the U. S. Supreme Court, in an *habeas corpus* case, held that a petitioner under parole had sufficient status to seek *habeas corpus.*

In *Pollard v. U.S.,* 352 U.S. 354, wherein petitioner challenged his sentence after he had been released, the court, referring to *Morgan,* supra, and *Feswisk v. U.S.,* 329 v. 211, stated that the *"possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."* (352 U.S., 358.) (Emphasis added)

Likewise noteworthy are the dissenting remarks of Chief Justice Earl Warren (joined in by three other Justices) in *Parker v. Ellis,* 362 U.S. 574, 4 L. ed. 2d 963 (1960) wherein the petitioner had been released. The Chief Justice, in this habeas corpus case, stated that there are no custody restrictions on the grant of relief pursuant to the U.S.C. Section 2255, *not does release from custody render the matter moot.* He contended (362 U.S. at 593):

> "Conviction of a felony imposes *status* upon a person *which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."* (Emphasis added)

The purpose of the post-conviction relief statute of the State of Maine (14 M.S.R.A. Sections 5502-5508 (Maine Laws 1963, C. 310, Sec. 1)) was not to abrogate or repeal any rights on remedies theretofore available to persons convicted of crime. On the contrary, the aim of the statute was to improve and simplify procedures so as to enable persons convicted of crime

to avoid traps and pitfalls. As expressed by the Reporter of the Maine Rules of Criminal Procedure:

> "Apparently, the post-conviction relief statute was designed to simplify the procedure and avoid the injustice which results when relief is denied because the petition is given the wrong name or the wrong type of relief is requested. This provision is to make these proceedings as simple as possible and assure that a petitioner is afforded the relief to which he is entitled despite the formal inadequacies of his petition."
>
> Glassman, Maine Practice,
> Vol. 3, Rules of Criminal Procedure
> With Commentaries, 282

As the Reporter (Professor Harry Glassman) states in discussing the prior (1961) statute (Ibid. 286):

> "(The 1961 statute) . . . still preserved the distinction between habeas corpus, coram nobis and writ of error so that a defendant seeking post-conviction relief had to determine which remedy was the appropriate vehicle for reaching the error of which he complained.
>
> "The adotpion of the post-conviction relief statute in 1963 combining all three remedies in one proceeding denominated 'Post Conviction Habeas Corpus' relieved the Petitioner of this dilemma."

Even assuming a legislative intent to curtail coram nobis remedies, it is submitted that there was no intent that the statute operate retroactively, and affect rights already vested in 1963 and 1959. And if it were intended to have anything but prospective effect, the legislation would probably be invalid as contravening

the ex post facto and due process clauses of the Federal and Maine Constitutions.

See Maine Constitution, Article 1, Section 11 ("the legislature shall pass no bill of attainder, *ex post facto* law . . .")

The American Bar Association project on Minimum Standards For Criminal Justice, Standards Relating to Post-Conviction Remedies, recommended by the Advisory Committee on Sentencing and Review, Tentative Draft, p. 7 (Hon. Simon F. Sobeloff, Chairman) (1967), hereinafter referred to as "Standards", has recommended that the availability of post-conviction relief should not be dependent on the applicant's attacking a sentence then being served or other present restraint.

> "Unlike habeas corpus, the writ of error coram nobis was not limited by historical root to attacks upon present custody. Thus coram nobis could be used to challenge a sentence already completely served, where it formed part of the basis for a later multiple offender prosecution. See United States v. Morgan, 346 U.S. 502 (1954)."
>
> "Standards" at 41.

The recommendation urges ("Standards" at 43-44):

> "Elimination of the custody condition would permit persons convicted to challenge sentences of imprisonment already completed . . . probation, or suspended sentences. Frequently, this is made necessary by the application of multiple offender laws which upgrade the authorized or prescribed sentence for a present offense on the strength of the defendant's prior record. Parole consideration is likely to be influenced by the number of previous

> or concurrent convictions. Civil disabilities of more or less impingement frequently continue after a sentence has been completed. The proposal here made is merely that the availability of post-conviction review of the validity of criminal judgments should not turn upon present custody."

The Second Revised Uniform Post-Conviction Procedure Act, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association's House of Delegates in August, 1966, provides a similar result. See Appendix B of aforementioned "Standards", pages 102-104.

Said Second Revised Act provides that "any person who has been convicted of, or sentenced for, a crime and who claims:

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interests of justice;

(5) that his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute . . . a proceeding . . ."

The Advisory Committee's comment states ("Standards" 104):

> "The Second Revised Uniform Act does not contain any language restricting the remedy to per-

> sons actually serving the challenged sentence. The original Uniform Act and the First Revision were limited to persons 'incarcerated under sentence' and 'under sentence' respectively. Presumably, the elimination of those restrictive words signify the draftmen's intention to remove the custody prerequisite for post-conviction relief, an anachronism that has caused considerable difficulty."

It is submitted that the only reason that the custody requirement was contained in the original Uniform Post-Conviction Act of 1955 and similar legislation, is that it was taken from the Federal Act, 28 U.S.C. Sec. 2255, which is based on habeas corpus. In *Morgan,* supra, the U. S. Supreme Court clearly indicated the distinction between coram nobis and habeas corpus. This seems to have been lost on the Uniform commissioners. See 9 B. U.L.A. 353. And see also, 61 Col. L.R. 698:

> "The Uniform Post-Conviction P.S., which is in large part modeled on the federal remedy for federal prisoners."

In Maine, post-conviction procedure may be brought at any time. Title 14 Section 5502 M.R.S.A. states:

> "A petition may be filed at any time after the criminal conviction is final."

In *Lyons v. Goldstein* the court stated, 290 N.Y. 19, 47 N.E.2d at 428-79 (1943):

> "The inherent power of the court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted . . . no logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases."

(In *State v. Blackford Circuit Court,* 229 Ind. 3, 95 N.E.2d 556 (1950) the Indiana Supreme Court held that the five-year statute of limitations on its coram nobis statue violated the due process clause of the United States Constitution). (The decision indicates the distinction between habeas corpus and coram nobis).

Petitioner has present need for the relief requested herein. A pardon would not be adequate.

> "Executive clemency does not eliminate the fact of conviction; it merely results in ending further punishment . . . A pardon proceeds, not upon the theory of innocence, but implies guilt." *Lyons v. Goldstein,* 290 N.Y. 19, 47 N.E.2d 430.

(Note the following non-coram nobis cases:

Roby v. State, 96 Wis. 667, 71 N.W. 1046 (1897) involving a writ of error prosecuted while serving his sentence, but entire sentence served before decision; held not barred "from obtaining a reversal . . . *thus removing the stigma which wrongly rests on his name and reputation.*") (Emphasis supplied)

Commonwealth v. Fleckner, 167 Mass. 13, 44 N.E. 1053 (1896):

> "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction merely because a wrongly convicted person has paid his fine or served his term.")

B. SUBSTANTIVE

Plea Based on Misrepresentation

A plea and conviction may be set aside in a post-conviction proceeding where the same is procured by fraud and misrepresentation, trickery or deceit.

People v. Grgurevich, 315 P.2d 391, 153 C.A.2d 806, dictum, where defendant relies on promises, to which the prosecutor was a party, as the basis of his plea such as probation or light sentence.

In *People v. Odlum,* 205 P.2d 1106, 91 C.A.2d 761, it was held that coram nobis was available where petitioner's attorney represented that the judge agreed to give him a lesser sentence and the judge and the district attorney innocently seemingly corroborated this and the plea was based on such representation.

In *Hogan v. Supreme Court of New York,* 65 N.E. 2d 181, 295 N.Y. 92, the court stated that any court has power to strike from its records judgments which are void for fraud.

In *New Mexico v. Ortiz,* 427 P.2d 264 (1967) a plea of guilty was set aside and the judgment of conviction vacated where a guilty plea had been induced by an unkept promise of leniency (that the District Attorney would not proceed against the petitioner under the Habitual Criminal Act). Counsel advised Petitioner to plead guilty in accordance with the agreement. At the arraignment, the defendant informed the court that no promise of leniency had been made, that he understood that if he pled guilty, he would be sentenced to the penitentiary for not less than one or more than five years.

The court, stating that:

"Defendant's statement does not conclusively determine that in fact no promises had been made. See People of the State of New York v. Granello, 18 N.Y. 2d 823, 275 N.Y.S.2d 528, 222 N.E.2d 393 (1966)." declared (427 P.2d at 266; 77 N.M. at 755):

"A judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962); DeLeon v. United States, 355 F.2d 286 (C.C.A. 5 1966); Lattin v. Cox, 355 F.2d 397 (10th Cir. 1966); Ward v. Page, 238 F. Supp. 431 (D. Okla. 1965); McClure v. Voles, 233 F. Supp. 923 (N.D. W.Va. 1964); Roberts v. People, Colo. 404 P.2d 848 (1965); People v. Sharp, 157 Cal. App. 2d 205, 320 P.2d 589 (1958); People v. Wadkins, 63 Cal.2d 110, 45 Cal. Rptr. 173, 403 P.2d 429, 432 (1965); Putnam v. United States, 337 F.2d 313 (10th Cir. 1964) . . . To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to its entry would constitute a denial of due process of law."

See *Sutton v. State,* 35 Okla. Crim. 263, 250 P. 930:

("the plea should be freely and voluntarily made by one competent to know the consequences, and should not be induced by fear, persuasion, promises or ignorance.")

There is no due process of law where a guilty plea is obtained by deception or trickery (See *Pa. ex rel. Herman v. Claudey,* 350 U.S. 116) and must be made intelligently and understandingly (see *State v. Jones,* 267 Minn. 421, 127 N.W.2d 153).

In *State v. Jones,* 267 Minn. 421, 127 N.W.2d 153, 157, it is said:

> ". . . a plea of guilty . . . should be received with caution . . . (S)hould not be entered where it is made by one who has not been advised of the nature and element of the offense charged; nor should the plea be induced by misapprehension or ignorance. No plea should be accepted where it appears doubtful that it is made intelligently and understandably."

In *Mooney v. Holoban,* 294 U.S. 103, 112-113 (1935), the Supreme Court indicated that:

> ". . . deliberate deception of court and jury by the presentation of testimony known to be perjured vacates due process and the state is required to afford corrective judicial process," citing *Frank v. Mangum,* 237 U.S. 309, 335 and *Moore v. Dempsey,* 261 U.S. 86.

See *People v. Picciotti,* 151 N.E.2d 191, 4 N.Y.2d 340, 174 N.Y.S.2d 32, in which it was held that a petitioner was entitled to a coram nobis hearing where petitioner claimed his plea of guilty was based on the District Attorney's threats that otherwise old indictments would be brought on for trial.

See *People v. Goldstein,* 152 N.Y.S.2d 320, 1 A.D. 2d 1044, wherein it was held that a plea of guilty induced by undue pressure (that if he did not plead

his co-defendants would "burn") and because the judge promised to give him a minimum sentence but actually gave him a longer term.

See *Lyons v. Goldstein,* 290 N.Y. 19, 47 N.D.2d 425, 428-29 (1943) on the "inherent power of a court" to set aside its judgment, criminal or civil, which was procured by fraud and misrepresentation.

In *People v. Wasnick,* 162 N.Y.S. 2d 739 (1957) defendant pleaded guilty to robbery in 1940 and was sentenced to 15-30 years. While on parole he was again convicted as a second offender and sentenced to 15-25 years. The application in the nature of a writ of coram nobis to vacate the judgment of conviction of 1940 "upon the ground that he pleaded guilty to robbery in the first degree, unarmed, in reliance upon a promise by the court that he would receive a sentence of not more than 10-20 years and that the promise was not kept."

The court, stating that defendant should be given the right to withdraw his plea, cited *People v. Farina,* 2 App. Div. 2d 776, 154 N.Y.S.2d 501, 502, affirmed 2 N.Y.2d 454, 141 N.E.2d 589, wherein defendant applied via writ in the nature of coram nobis to withdraw his guilty plea on the ground that he was induced to enter a plea of guilty on the promise of the court to sentence him to a 10-20 year term, that he relied on the promise and was deceived by the court's failure to keep the promise. The court held that:

> "While we do not imply that appellant was tricked into entering a plea of guilty, or that the promise made at the time of the entry of that plea was consciously violated, the result, insofar as appellant is concerned, was the same. *Such a result,*

whether caused by inadvertence or design, is inconsistent with due process of law, and the conviction cannot stand." (Emphasis added)

In *People v. Butterfield,* 37 C.A.2d 140, 99 P.2d 310, petitioner claimed he was persuaded to plead guilty by the misrepresentation of a person who was acting as a stool pigeon for the officers to procure that result. Said person promised in the name of the District Attorney that if he pled guilty to murder he would not be punished for any offense higher than manslaughter. In the coram nobis proceeding the Court, directing that petitioner be permitted to withdraw his plea of guilty and enter a plea of not guilty, stated (32 C.A.2d at 147):

"(T)he fraud . . . exercised to induce the petitioner to plead guilty . . . wrongfully deprived him of the right of trial by jury."

In *State v. Parker,* 413 S.W.2d 489, 493, the court said:

"A plea of guilty in open court is a solemn confession of guilt, but like a confession out of court, should be received with caution. The plea should not be acceted by the court unless it is voluntarily and understandingly made. 'If the defendant should be misled or be induced to plead guilty by fraud or mistake, by misapprehension, fear, persuasion, or the holding out of hopes which prove to be false or ill founded, he should be permitted to withdraw his plea. The law favors a trial on its merits.'"

In *Commonwealth v. Wood,* 425 Pa. 612, 230 A.2d 729 (1967), the court, in a post-conviction proceeding,

ordered a hearing for the purpose of determining whether petitioner's guilty plea was knowingly and understandingly entered. The petition was based on the claim that the guilty plea was entered solely because a state official promised that if petitioner would plead guilty he would be convicted only of receiving stolen goods, not burglary, and would be committed to a state hospital rather than prison. The court stated that "Petitioner's allegations, if true, would invalidate the guilty plea, Commonwealth ex rel. West v. Myers, 423 Pa. 1, 222 A.2d 918 (1966)."

In *Dwyer v. Maine,* 151 Me. 382, 396, 120 A.2d 276 (1956) the court held that a writ of error coram nobis would issue where the issue involved was the voluntariness of petitioner's plea of guilty. The office of coram nobis "is for the purpose of presenting facts which, if known at the time of the trial, would have prevented the judgment from being rendered."

In *Dwyer* the court stated that (151 Me. at 388):

> "The United States Supreme Court has pointed out many times that there should be a post-conviction procedure within the various states which will be broad enough to cover all deprivations of constitutional rights under the Federal Constitution, and it is well to note that a writ of error *coram nobis* has been accepted by the United States Supreme Court as an appropriate post-conviction remedy. *Hysler v. Florida,* 315 U.S. 411, 62 S.Ct. 688, 86 L.ed. 932."

See also, *Nickels v. State,* 86 Fla. 208, 98 So. 502 (1923), citing *Pope v. State,* 56 Fla. 81, 84, 47 So. 487, 488 (1908) where it was held that a plea of

guilty "should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance."

Ignorance or Mistake of Fact

A plea and conviction may be set aside where the same results from ignorance or inexcusable mistake of fact.

In *People v. Breckenridge,* 190 N.Y.2d 122, 16 Misc. 2d 704, the petitioner was convicted upon his plea of guilty of operating an unregistered motor vehicle. A State Trooper had mistakenly told Petitioner therein that his ten-day permit had expired; in reliance thereon he decided to plead guilty. The court, in a *coram nobis* writ, ordered the judgment of conviction vacated, having found (16 Misc. 2d at 700):

> ". . . that the plea of guilty was improvident and was based upon misunderstanding and misrepresentation of the law.
>
> "It is immaterial that the authorities obviously intended no misrepresentation.' (People v. O'Neill, 7 A.D.2d 997, 998 . . .).
>
> "There is no implication that appellant was tricked into entering a plea of guilty by any design of fraud on the part of any of the public authorities, but the result of the mistake of law was a plea of guilty. 'Such a result, whether caused by inadvertence or design, is inconsistent with due process of law, and the conviction cannot stand.' (People v. Farina, 2 A.D.2d 776 (1956); People v. Sullivan, 276 App. Div. 1087, 1088)."

The Alabama Supreme Court has stated that the function of coram nobis is to set aside a conviction "obtained by duress or fraud, or when by some excusable mistake or informance of the accused and without negligence on his part, he has been deprived of a defense which would have been used at the time or when facts have been concealed at the trial which if known would have prevented a conviction and the accused cannot at the time present such matter in a motion for a new trial, or appeal or other existing statutory proceeding."

Stevens v. State (1951) 36 Ala. App. 57, 52 So. 2d 169, 170.

See also *Ex parte Powell,* 102 So.2d 923, 39 Ala. App. 423.

In *Application of Leonard,* 111 N.Y.S.2d 85, 280 App. Div. 1, affirmed 106 N.E.2d 66, 303 N.Y. 99, in a coram nobis proceeding it was held that coram nobis would lie to set aside a plea induced by misrepresentation or as a result of mistake of fact. Said the court (in this mistake of fact, not actual fraud):

> "He was induced to enter a guilty plea solely upon the erroneous statements made by the district attorney."

In *Commonwealth v. Stokes,* 232 A.2d 193, 195—Pa. —(1967) the court stated:

> "Moreover, 'because of the serious consequences which are attendant on the entry of a plea of guilty, strict adherence must not be had to the rule that knowledge of counsel is imputable to the accused.' Commonwealth ex rel. McKenna v. Cavell, 423 Pa. 387, 393, 224A.2d 616, 619 (1966). Thus

> when challenging the validity of the plea, a petitioner is entitled to have the court consider his allegations of fact which are dehors the record. See Machibroda v. United States, 368 U.S. 487, 82 S. Ct. 510, 7 L.Ed. 2d 473 (1962); United States ex rel. McGrath v. LaVallee, 319 F.2d 308 (2nd Cir. 1963); Commonwealth ex rel. West v. Myers, 423 Pa. 1, 222 A.2d 918 (1966)."

See *Nickels v. State,* 86 Fla. 208, 98 So. 502 (1923), citing *Pope v. State,* 56 Fla. 81, 84, 47 So. 487, 488 (1908) where it was stated that a plea of guilty "should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance."

> "The important thing is . . . that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced."
>
> *Cortez v. United States,* 337 F.2d 699 (9th Cir.)

Ineffective Counsel

Representation by incompetent counsel is properly raised in a coram nobis petition where the conduct of counsel is of such a caliber as to amount to deprivation of counsel in violation of the due process clauses of the Federal and Maine Constitutions.

See *Bennett v. State,* 161 Me. 489, 214 A.2d 667 (1965).

See also, *People v. Morris,* 3 Ill.2d 437, 122 N.E.2d 810.

In *State v. Osgood,* 266 Minn. 315, n.2, 123 N.W.2d 593 (1963) the court, in holding that there was a denial of due process, stated:

> "The right to counsel cannot be nullified by the appointment of counsel who merely furnishes perfunctory or casual representation. It carries with it the requirement that consultations with counsel be sufficiently adequate to inform the accused of all of his legal rights under the law and facts involved." (Citing, among other cases, *Fay v. Noia;* 372 U.S.391, 83 S.Ct. 822, 9 L.Ed. 2d 837).

In *Osgood,* attorney and defendant conferred for several minutes before defendant pleaded guilty because attorney advised him he would get a short term. In fact, however, there was a mandatory penalty of a longer period.

In *People v. Morris,* 121 N.E.2d 810, 3 Ill. 2d 437 (1954) counsel failed to investigate to determine if Petitioner could avail himself of certain statutory rights. The Illinois Supreme Court stated, in setting aside judgments of conviction, that the representation of petitioner by counsel did not meet the standard expected of a competent and conscientious trial attorney. Said the court:

> "There can be no justifiable excuse for an attorney who purports to represent a defendant in a criminal prosecution not being familiar with its (4-month-statute) provisions. Nor do we perceive any justification for counsel here not checking records or otherwise making an investigation in order to determine if the defendant could avail himself of rights under the statute."

In *John v. Huff,* 152 F.2d 14 (D.C. Cir. 1945) the court stated that where evidence was improperly admitted in violation of the constitution and witnesses who would have established defendant's innocence were not called by his counsel, who failed to offer a defense, the accused was not accorded a fair trial under the Fifth Amendment.

See *U.S. v. Ragen,* 60 F.Supp. 820, 823 (the court applying the 14th Amendment said it is the duty of State's Attorney and the trial judge to protect the rights of the defendant in a trial as it is the duty of State's Attorney to secure a conviction. When it became apparent to the prosecuting attorney that the interests of the defendant were being prejudiced by an unqualified lawyer it was his duty to ask for a mistrial. Failure to do so constitutes violation or due process).

New Mexico v. Moser, 430 P.2d 106 (1967) was a post-conviction proceeding challenging the validity of a prior conviction which formed the basis of the enhanced sentence. The claim was lack of effective counsel (which counsel had been employed by the defendant). Said the Court:

> "When, however, a petition for post-conviction relief alleges facts, set out in particularity, of his claim of inadequate criminal representation under this standard, he is entitled to a hearing on the question . . . Laughner v. United States, 360 F.2d 159 (5th Cir. 1966); Dayton v. United States, 115 U.S. App. D.C. 341, 319 F. 2d 742 (1963); see Annot., 74 A.L.R. 2d 1390."

In *Tucker v. U.S.,* 235 F.2d 238 (9th Cir. 1956) the court said that counsel's failure to adequately ques-

tion and properly examine the key witness amounts to denial of the constitutional right to counsel.

State ex rel. Dehning v. Rigg, 251 Minn. 120, 86 N.W.2d 723, 726 (1957), involved a guilty plea after a ten-minute consultation with an attorney. Said the court:

> "That right (of counsel; cannot be nullified by the appointment of counsel who merely furnishes perfunctory or casual representation."

In *People v. Ibarra,* 34 Cal. Rptr. 863, 867; 386 P.2d 487, 491 (1963), the Supreme Court of California reversed a conviction because of a deputy public defender's "failure to research the applicable law."

There have been numerous recent reversals grounded upon defense counsel's failure adequately to investigate his client's case and advise him knowledgeably regarding his plea.

See, e.g., *Edgerton v. State,* 315 F.2d 676, 678 (4th Cir. 1963). (Counsel allegedly did nothing except to urge the accused to plead guilty. The best advice obtainable is worth little if it is not based upon a thorough knowledge of the facts of the case. . . .")

Brubaker v. Dickson, 310 F.2d 30 (10th Cir. 1962) cert. denied 372 U.S. 978 (1963) (failure to investigate potential defenses).

Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962) (counsel urged guilty plea after superficial investigation).

Banks v. U.S., 249 F.2d 672 (9th Cir. 1957) cert. denied 358 U.S. 886 (1958) (failure to request entrapment instruction).

Where failure to call a material witness is unexplained, and was a product of cursory pretrial investigation, counsel was held ineffective. *John v. Huff,* 152 F. 2d 14 (D.C. Cir. 1945).

> "Assuming at least minimal professional competence, the test is simply one of due diligence on the part of the counsel in discerning and seeking factual support for potential defenses."
>
> Oaks, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 N.W.U.L.R. 289, 314.

Petitioner respectfully requests that a hearing be had herein and this court order the plea and conviction herein vacated and grant any other and further relief which this court deems proper.

Respectfully submitted,

DAVID M. COX, ESQ.,
P. BASIL LAMBROS, ESQ.,
ELIOT B. FELDMAN, ESQ.,
By ELIOT B. FELDMAN,

ELIOT B. FELDMAN,
On The Memorandum.

APPENDIX B.

Decree of Superior Court, per Judge Randolph W. Weatherbee.

State of Maine, Hancock, S.S.

William E. Thoresen, III, Petitioner vs. State of Maine, Respondents. Superior Court Docket No. 1778.

On October 29, 1967, the petitioner subscribed and swore to a petition for post-conviction relief which he states is based upon *coram nobis,* the statutes of the State and the general and equitable powers of the court. It asks that the court declare vacated the petitioner's plea of guilty and conviction in the matter of a charge of larceny which was brought against him by way of an Information in the Hancock County Superior Court in September, 1959. On September 21, 1959, the petitioner was sentenced on the reference charge to the Reformatory for Men and the sentence was suspended and he was placed on probation for a period of two years. His probation was terminated in September, 1961.

The respondent moved to dismiss the petition. Paragraphs 1, 2 and 6 of the motion allege valid grounds for dismissal. However, if I were not required to dismiss the petition on other grounds. I would permit the petitioner to amend to cure these failures to comply with the requirements of the reference rules and statutes.

In my opinion the petition has other, and fatal, defects.

It is evident from the petition that the petitioner is not incarcerated under the sentence which was imposed by the Hancock County Court nor is he still on probation therefor. Therefore, he is not included among the

persons to which our post-conviction habeas corpus statute is available. Longway v. State, 161 Me. 430, 231 A. 2d 519 (1965). (The petitioner in his supporting brief argues that as the decision in *Longway* was based on alternative grounds it carried less weight as precedent than would be the case if the fact that the petitioner was no longer serving his sentence was the sole basis for the decision. Our court made clear in Hamner v. State, Me. 233 A.2d 532 (1966) that in such a case when both issues have been fully briefed and argued each ground for the court's decision is entitled to be given full weight as precedent).

In my opinion it was the intention of the legislature in the enactment of Laws of Maine 1963, Chap. 310, An Act Relating to Habeas Corpus and Post Conviction Procedure in Criminal Cases, that this Act should become the sole available vehicle for post-conviction relief in criminal matters.

The history of our post-conviction Act contributes to this conclusion on my part. Post-conviction relief in criminal matters involving alleged errors of fact not of record had been sought very rarely in the courts of Maine until 1956 when our court in Dyer v. State, 151 Me. 382, 120 A.2d 276 made it clear that the common law writ of error *coram nobis* was available in our State in criminal proceedings. In 1961 our legislature enacted Chap. 131 which created a statutory action of writ of error *coram nobis* in criminal matters. Its language was very similar to our present post-conviction statute and it did not supercede the statutory writ of error, which was available only to correct alleged errors of record, and the statutory habeas corpus.

The act of 1963 which has become our present post-conviction statute repealed both the statutory writ of

error *coram nobis* sections (which had become Chap. 126A) and the sections applying to writ of error in criminal matters (Chap. 129, Sec. 11 & 12).

Thus our present act not only states that if was exclusive, but it also removed from the statutes all other available judicial procedures for obtaining the voiding of convictions allegedly unlawfully obtained.

Does the common law writ of writ of error *coram nobis* in criminal matters remain? I think not. Our statute, Sec. 5502, uses what I consider to be unambiguous language.

> ". . . it comprehends and takes the place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof."

In my opinion our statutory post-conviction habeas corpus statute, 14 M.R.S.A., Sec. 5502 ff., is the only procedure existing in our State for the judicial correction of alleged errors in criminal matters.

In Wood v. State, 161 Me. 13, 206 A.2d 223 (1965) our court spoke of our statutory post-conviction habeas corpus as "providing amongst multiple remedies relief in the nature of habeas corpus and of *coram nobis*." In Mottram v. State, Me. 232 A.2d 809, our court, in finding that our post-conviction habeas corpus statute was available to a prisoner to test the legality of his return as a parole violator, said:

> "Such interpretation is consistent with the legislative purpose to provide a single exclusive remedy for all collateral attacks on judgments of conviction post conviction as its title indicates. . . . This indicates a legislative intent to include relief beyond

> the sphere of remedial action provided by the previous habeas corpus, writ of error and common law coram nobis proceedings, which our statutory post-conviction habeas corpus was designed to supplant."

The petitioner argues that even if the legislature did intend to eliminate the use of writ of error *coram nobis* in criminal matters it was not intended that the statute should operate retro-actively. Certainly, the passage of the act in question would not affect the rights of a person who had already commenced an action of *coram nobis*—such as the petitioner in Cressey v. State, 161 Me. 295, 211 A.2d 572 (1965). However, in my opinion its language clearly shows the legislature's intention that the common law writ of *coram nobis* as well as the statutory writ of error *coram nobis* should no longer be available in criminal matters after the effective date of the new post-conviction habeas corpus law.

My conclusion is the same as to any equitable powers of the court.

Being a court of first instance, I assume the constitutionality of our statute making post-conviction relief available only to persons who are incarcerated.

Therefore, as the petitioner was no longer incarcerated as a result of the judgment of guilt complained of, his petition is dismissed on its face, and the writ denied.

Dated: December 4, 1967.

Randolph A. Weatherbee
Associate Justice, Supreme Judicial Court
Sitting in the Superior Court

APPENDIX C.

Post-Conviction Statute.

14 M. R. S. A., Sec. 5502:

"Post-conviction habeas corpus

"Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined, who claims that he is illegally imprisoned, or that there were errors of law of record, or that his sentence was imposed in violation of the Constitution of the United States or of this state, or that there were errors of fact not of record which were not known to the accused or the court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction, may institute a petition for a writ of habeas corpus seeking release from an illegal imprisonment, correction of an error of law of record, or to set aside the plea, conviction and sentence, provided that the alleged error has not been previously or finally adjudicated or waived in the proceeding resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

"The remedy of habeas corpus provided in sections 5502 to 5508 is not a substitute for nor does it affect any remedies which are incidental to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in sections 5502 to 5508, it comprehends and takes the place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof. A petition may be filed at any time after the criminal conviction is final."

APPENDIX D.

Opinion of the Supreme Judicial Court of Maine.

William E. Thoresen, III v. State of Maine.

Supreme Judicial Court of Maine. March 18, 1968.

Proceeding on petition for post-conviction relief. The Superior Court, Hancock County, granted motion to dismiss petition and the petitioner appealed. The Supreme Judicial Court, Webber, J., held that remedy afforded by post conviction relief statute was not available to petitioner who was under no form of restraint in Maine and who after his probation, composed following conviction for felony in Maine, was formally terminated wished to use procedure to contest validity of conviction on ground that he did not understand he was pleading guilty to felony

Appeal denied.

Gene Carter, Bangor, Eliot B. Feldman, Los Angeles, Cal., John P. Frank, John J. Flynn, Phoenix, Ariz., for petitioner.

John W. Benoit, Asst. Atty. Gen., Augusta, for respondent.

Before Williamson, *C.J.*, and Webber, Tapley, Marden, Dufresne and Weatherbee, *JJ.*

Webber, *Justice.*

This was a petition for post conviction relief. A motion to dismiss filed by the respondent was granted below. Dismissal was predicated upon the fact that the petitioner is not now under any actual or technical restraint in Maine. On appeal we look to the allegations of the petition to ascertain whether or not it recites valid facts which, if proven, would entitle the petitioner to relief.

The petition asserts that in 1959 the petitioner was arrested and charged with larceny of pictures. Petitioner employed attorney to represent him. Thereafter petitioner elected to plead guilty to an information charging him with the larceny of six pictures, each separately described and valued, but "all in the aggregate value of one hundred and fifty dollars." He was thereupon sentenced as for a felony but the sentence was at once suspended and he was placed on probation for a period of two years. He was permitted to leave the State of Maine. The terms of his probation were properly complied with and the probation was formally terminated by the Superior Court in 1961. In 1967 the petitioner was indicted in the Federal District Court in California for an alleged violation of Title 15, U.S.C., Sec. 902(e). An element of the crime charged is that the petitioner is a person previously convicted in Maine of a crime punishable by a prison term in excess of one year. In order to set aside the Maine conviction, petitioner now seeks an opportunity to prove that the pictures stolen in Maine in 1959 had a value not in excess of twenty-six dollars and that this fact was then unknown to petitioner. In effect petitioner seeks to prove that he did not know or understand that he was pleading guilty to a felony and would not have so pleaded if he had understood the nature of the charge.

By P.L.1963, Ch. 310, Sec. 1 the Legislature enacted a comprehensive post-conviction relief statute which now appears in the statutes at 14 M.R.S.A. §§ 5502 to 5508 inclusive. That this remedy was intended to be the sole and exclusive method of collateral attack upon the legality of a conviction and sen-

tence was clearly stated by the statute itself. § 5502 provides in part:

> "The remedy of habeas corpus provided in sections 5502 to 5508 is not a substitute for nor does it affect any remedies which are incidental to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in sections 5502 to 5508, *it comprehends and takes the place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof.*" (Emphasis ours)

Moreover, the remedy formerly afforded by the writ of error coram nobis as understood and recognized in this state was incorporated into Sec. 5502 in these terms, "* * * or that there were errors of fact not of record which were not known to the accused or the court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction, * * *." We are satisfied that the common law writ of error coram nobis recognized as available to a petitioner under custodial restraint in Dwyer v. State (1956) 151 Me. 382, 120 A.2d 276 ceased to exist when it was superseded by the "coram nobis" statute enacted by the Legislature in P.L.1961, Ch. 131. See Bennett v. State of Maine et al. (1965) 161 Me. 489, 493, 214 A.2d 667, 670. This statute, then R.S.1954, Ch. 126-A, was in turn repealed by Sec. 5 of P.L. 1963, Ch. 310, the chapter which simultaneously enacted the post-conviction relief statute in its present form.

Is the remedy afforded by 14 M.R.S.A. §§ 5502 to 5508 available to a petitioner who admittedly is presently under no form of restraint in Maine? We think not. Sec. 5502 itself limits availablity in these terms:

> "Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined, * * * may institute a petition for a writ of habeas corpus * * *."

Clearly the statute contemplates either a presently existing actual or physical restraint or a technical hold or restraint which under appropriate circumstances (as for example by violation of probation or parole or nonpayment of fine) could be converted to a physical restraint. No doubt the requirement stems from a legislative judgment that litigation must eventually come to an end and the dockets of the courts must not be clogged with stale claims. We recognized the statutory requirement when we said in Longway v. State of Maine et al. (1965) 161 Me. 430, 432, 213 A.2d 519, 520. "He has satisfied the sentence imposed for larceny and any issue sought to be raised with respect to the trial upon the larceny indictment is of course now moot." In the very recent case of Green v. State of Maine et al., Me., 237 A.2d 409 (Opinion January 23, 1968) we liberally construed the statute to permit its use by one under actual restraint in Maine in execution of a sentence imposed under the so-called "habitual criminal" statute (15 M.R.S.A. § 1742), it being alleged that there had been an unconstitutional deprivation of counsel at the time of a prior Maine convic-

tion. We held that the existing restraint was "directly attributable to the enhancement of the larceny sentence by application of the recidivist statute." We emphasize, however, that in Green there was the presently existing restraint in Maine which the post-conviction habeas corpus statute in clear and unambiguous terms requires as a prerequisite to relief. The absence of any form of continuing restraint in the instant case is fatal to the petitioner's claim.

Appeal denied.

Weatherbee, *J.*, did not sit.

Dufresne, *J.*, sat at argument but did not participate in this decision.

APPENDIX E.

Application for Writ.

United States District Court, District of Maine, Northern Division.

In the Matter of the Application of William E. Thoreson, III, Petitioner. Civil No. 1721.

Application for Writ of Habeas Corpus

ORDER

Upon consideration of the above entitled application for a Writ of Habeas Corpus filed April 2, 1968, I find that I am without jurisdiction to entertain the application for the reason that it appears from the application and its accompanying papers that the applicant is not confined, detained or otherwise restrained of his liberty within the territorial limits of the District of Maine. *Ahrens v. Clark,* 335 U.S. 188 (1948); *Parker v. Ellis,* 362 U.S. 574 (1960); *Duncan v. Maine,* 195 F. Supp. 199 (D. Me. 1961); see *Carbo v. United States,* 364 U.S. 611, 619-620 (1961).

It Is Therefore Ordered that the application is dismissed and the writ denied.

Dated at Bangor, Maine this 11th day of April, 1968.

/s/ Edward T. Gignoux
Judge, United States District Court

A True Copy
Attest: Morris Cox, Clerk
by W. Catherine Koch
Deputy Clerk

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In the
Supreme Court of the United States

OCTOBER TERM, 1968
No. 203

WILLIAM E. THORESEN, III
PETITIONER
v.
STATE OF MAINE
RESPONDENT

BRIEF IN OPPOSITION

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State House,
Augusta, Maine

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State House,
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APPENDIX

Appendix A. Opinion by United States Court of Appeals for the First Circuit on Application for Certificate of Probable Cause 7

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 203

WILLIAM E. THORESEN, III

PETITIONER

v.

STATE OF MAINE

RESPONDENT

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Does the Federal Constitution require a state to entertain a 'federal constitutional question' which two Federal District Courts have refused to entertain for lack of jurisdiction?

2. Does the Federal Constitution forbid a state legislature from enacting jurisdictional provisions in a habeas corpus statute, which provisions are synonymous with those in the Federal habeas corpus statute?

STATEMENT OF THE CASE

In 1959, petitioner was arrested and charged with larceny of pictures. Counsel was employed by the petitioner in the case. After consultation with counsel, petitioner elected to petition for information proceedings; and he subsequently pleaded guilty to an infor-

mation charging him with the larceny of six pictures "all in the aggregate value of one hundred fifty dollars". He was thereafter sentenced as for a felony; but the sentence was suspended and petitioner was placed on probation for two years. In 1961, petitioner's probation was terminated after its terms had been properly followed.

In 1967, six years after the completion of the service of the probation, and after having been indicted in the Federal District Court in California for an alleged violation of 15 U.S.C. § 902 (e) (interstate shipment of firearms by a felon), petitioner instituted a state post-conviction petition claiming that the pictures were not valued over one hundred dollars, and that he did not understand that he was pleading guilty to a felony per the 1959 state court proceedings. His collateral attack of the conviction was brought under 14 M.R.S.A. § 5501, et seq., which provided that the action was available to:

> "Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined * * *."

The Maine Supreme Judicial Court, in *Thoresen v. State*, 239 A. 2d 654 (1968), held that because the petitioner was not involved with "either a presently existing actual or physical restraint or a technical hold or restraint" (probation or parole), the petition did not confer jurisdiction on the court to adjudicate the merits of the case.

Petitioner's subsequent applications for Writs of Habeas Corpus in the Maine Federal District Court and in the Federal District Court for the Northern District of California were dismissed because of a lack of jurisdiction.*

*The United States Court of Appeals, First Circuit, denied a certificate of probable cause on May 13, 1968, with an addendum on May 24, 1968. The Opinion denying the petitioner's application for the certificate is attached as Appendix A hereto.

ARGUMENT

I.

THE DECISION BELOW IS CORRECT.

A. *Maine Provides an Adequate Post-Conviction Process for Determining Federal Constitutional Violations.*

This is not a case where Maine has failed to enact an "adequate corrective process for the hearing and determination of claims of violation of Federal Constitutional guarantees". *Case v. Nebraska*, 381 U.S. 336, 14 L.Ed. 2d 422, 85 S. Ct. 1486 (1965). Maine's post-conviction statute, 14 M.R.S.A. § 5501, et seq., received favorable mention in *Case v. Nebraska*, supra, note #3, p. 338, 345.

B. *Because the State Court Decision Turned Upon a Question of State Jurisdiction, No Federal Issue is Presented.*

The State Court decision involved here turned upon a question of state jurisdiction; and the decision is controlled by a state statute regarding Maine's habeas corpus statute. In effect, the petitioner is asking this Court to strike down state legislation per state court jurisdiction, even though two Federal District Courts have declined to entertain this case on the basis of a lack of federal jurisdiction.* Surely, a state court is not to be held to a position superior to that of federal courts regarding an alleged 'federal question'.

There is certainly no conflict here between the Maine Court and the Federal District Courts of California and Maine; the decisions of all three Courts are rested upon nearly identical jurisdictional grounds. *Ahrens v. Clark*, 335 U.S. 188; *Thoresen v. State*, 239 A. 2d 654.

*Too, the Courts of Appeals for the First and Ninth Circuits denied certificates of probable cause. Misc. No. 263 and Case No. 22919, respectively.

C. *The Cases Cited by the Petitioner Are Not Authority for the Granting of the Writ.*

The cases of *Foster v. Illinois*, 332 U.S. 134, *Young v. Kagen*, 337 U.S. 235, 93 L.Ed. 1333, 69 S. Ct. 1073, and *New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 87 L.Ed. 1083, 63 S. Ct. 840, cited by the petitioner (as well as other cases cited at page 6 of the petition) are not applicable because Maine does possess an adequate corrective post-conviction process. 14 M.R.S.A. § 5501, et seq.

The remaining cases cited in the petition are distinguishable from the instant case. *United States v. Morgan*, 346 U.S. 502 was not a habeas corpus case; but a federal coram nobis proceeding. Even at that, the case noted the presence of *United States v. Lavelle*, 194 F.2d 202, as constituting controlling authority for refusal to entertain a case where the petitioner was not then in custody. In both *Fiswick v. United States*, 329 U.S. 211, 91 L.Ed. 196, 67 S. Ct. 224, and *Carafas v. LaVallee*, —U.S.—, 36 L. W. 4409 (May 20, 1968), the petitioners had "standing" when they commenced their actions, i.e., they were then in custody. Their subsequent discharges from imposed sentences did not divest the Federal District Courts from jurisdiction. Here, the petitioner commenced the state habeas corpus proceeding six years after the date of discharge from the sentence. The case of *Ginsberg v. New York*, —U.S.—, 20 L. Ed. 2d 195, is not applicable because Maine is not imposing any penalties upon petitioner whatsoever. *Tannenbaum v. New York*, 338 U.S. 439, 18 L. Ed. 2d 1300, 87 S. Ct. 2107, and *Jacobs v. New York*, 388 U. S. 431, 18 L. Ed. 2d 1294, 87 S. Ct. 2098.

D. *Petitioner is Not Without an Adequate Federal Remedy at Law.*

Trial of the petitioner in Fresno, California, on the federal indictment [charging the shipping of firearms in interstate commerce by a person who has been convicted of a crime punishable by imprisonment for more than one year - 15 U.S.C. § 902 (e)] is set for June 24,

1968. Part of the government's case bears upon proof that petitioner has previously been properly convicted of a felony in Maine. Petitioner's remedy at law is found in *Burgett v. Texas*, 389 U.S. 109.

CONCLUSION

Maine does possess adequate corrective process for hearing and determining claims of Federal Constitutional guarantees under its habeas corpus statute; but that process does have jurisdictional limits like those of federal habeas corpus. The State Court's decision declining to entertain the petition because the petitioner was not in custody when the petition was filed (and, therefore, the state court had no jurisdiction), is in accord with the positions of Federal District Courts in California and Maine who have also declined to take jurisdiction of this case. *Ahrens v. Clark*, supra; *Tannenbaum v. New York*, supra; and *Jacobs v. New York*, supra.

Petitioner has an adequate remedy at law in the trial of the pending federal indictment because the government is required to prove that the petitioner has previously been correctly convicted of a felony in Maine. *Burgett v. Texas*, supra.

Respectfully submitted,

JOHN W. BENOIT, JR.
Assistant Attorney General
Attorney for Respondent

July, 1968

Appendix A

United States Court of Appeals

For the First Circuit

Misc. No. 263.

In the Matter of
WILLIAM E. THORESEN, III,
PETITIONER.

OPINION ON APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Gene Carter, John P. Frank, John J. Flynn, Eliot Feldman, Rudman, Rudman, & Carter and *Lewis, Roca, Beauchamp & Linton* on application for petitioner.

May 13, 1968.

ALDRICH, *Chief Judge*. This is a request for a certificate of probable cause for appeal from an order of the District Court for the District of Maine dismissing an application for a writ of habeas corpus for lack of jurisdiction. A somewhat detailed recitation of facts is called for.

In September 1959, when petitioner was 21 years old, he stole six posters from the Bar Harbor, Maine, terminal of the Canadian National Railway's Nova Scotia ferry. He was apprehended and jailed for want of bail. Thereafter he waived indictment. The waiver which he executed recited that he was charged with "[l]arceny of goods having a value in excess of One hundred dollars." On the same day he pleaded guilty to an information in which the posters were assigned

individual values, totalling an "aggregate value of one hundred and fifty dollars." Between the date of his apprehension and the date of his plea, a period of some ten days, petitioner was continuously in jail. According to affidavits accompanying the present application the following events occurred.

Petitioner employed an attorney, who in turn made contact with petitioner's father. Upon his arrival the father essentially discharged the attorney and conducted lengthy negotiations with the district attorney in the absence of counsel. The father brought with him funds sufficient to bail petitioner, but did not bail him. He informed the district attorney that he was worried about petitioner and thought that he should be treated in a mental institution; that he did not want the petitioner to know that this was the father's proposal, and that he did not want petitioner fined, but thought it best that he receive a suspended sentence and probation, as a result of which, if petitioner was released forthwith, he could return to his home in Illinois for treatment, but be under the custody of the court. After some difficulty the petitioner's father and the district attorney persuaded petitioner to plead guilty, the father informing petitioner that everything would be all right, and that he was only pleading to a "misdemeanor type" offense. Thereafter petitioner pleaded guilty, as aforesaid. He received a two-year suspended sentence, and in 1961 was discharged from the terms of his probation.

Petitioner is presently a resident of California. In 1967 he was indicted in the United States District Court in California for transporting firearms in interstate commerce having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year." 15 U.S.C. § 902(e). The prior conviction relied upon is that just described. Investigation by petitioner's counsel revealed the foregoing facts, and revealed, further, that the Canadian National Railway had paid a small sum for the posters in question, $2.25 apiece for five and some $15 for the sixth, from which

it could fairly be said that by no possibility was the stolen property of a value in excess of $100. Accordingly, the larceny to which petitioner had pleaded should not have been so described, and petitioner was not in fact guilty of an offense within the ambit of section 902(e).[1]

On this basis petitioner sought postconviction relief in the State of Maine. The Maine Supreme Judicial Court dismissed for lack of jurisdiction, holding that the only relief open in that state is under its habeas corpus statute; that habeas corpus is not available when the petitioner is no longer in custody, and that no greater rights attached to the petitioner, so far as the Maine courts were concerned, by virtue of the California proceedings. The present application was then filed in the district court, and dismissed for want of jurisdiction. The district court having declined to issue a certificate of probable cause for appeal, our sole present question is whether that declination was proper.

Petitioner's difficulty is his inability to demonstrate the "custody" required by 28 U.S.C. § 2241(c) before the writ of habeas corpus can issue, a problem pointed up by his failure to name a respondent against whom the writ is to issue. We do not have merely the situation which moved a minority of the Court in *Parker v. Ellis*, 1960, 362 U.S. 574, 577 and 595 (dissenting opinions), where custody terminated during the pendency of the action, see, also, *Thomas v. Cunningham*, 4 Cir., 1964, 335 F.2d 67; here there was no custody—at least so far as Maine was concerned—when the application was filed. Apparently petitioner believes that he is contesting a state interest in the light of the fact that he seeks a certificate of probable cause under 28 U.S.C. § 2253. Yet the absence of any respondent has the serious legal consequence that there was no controversy, and the serious practical effect that there was no one to contest.

---

[1]Conviction for larceny of goods whose value is less than $100 carries a maximum term of six months. Me. Rev. Stat. Ann. tit. 17, § 2101.

Petitioner also asserts the custody of the United States in connection with the proceedings pending against him in California.[2] Assuming that this be sufficient custody, *but cf. Allen v. United States*, 1 Cir., 1965, 349 F.2d 362, jurisdiction would not lie in the District of Maine. *Ahrens v. Clark*, 1948, 335 U.S. 188. While we suggest no opinion on the question, even if, as petitioner asserts, there should be nowhere that he may now seek a writ of habeas corpus, it does not necessarily follow that he is remediless so far as defending against the California indictment is concerned. *Cf. Burgett v. Texas*, 1967, 389 U.S. 109. We, of course, express no views as to the applicability of *Burgett*, or whether on the facts alleged petitioner was unconstitutionally convicted.

Certificate denied.

May 24, 1968.

PER CURIAM. On May 20 the Supreme Court overruled *Parker v. Ellis*, 1960, 362 U.S. 574, in *Carafas v. Lavallee*, 5/20/68, and decided *Peyton v. Rowe*, 5/20/68. We have reviewed these decisions and see no reason to alter ours.

---

[2] Petitioner urges that he is in a unique position under the statute as his federal custody by virtue of the indictment against him arguably places him "'in custody pursuant to the judgment of the state court' [28 U.S.C. § 2254] since the federal indictment is based upon a 1959 Maine conviction." We do not believe that this novel suggestion as to the meaning of "pursuant to" advances his case.